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The History and Possible Revival of the Fairness Doctrine

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Journalist

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The following is adapted from a speech prepared for a five-day conference on "The News Media Today," held at Hillsdale College on November 13-17, 2005.

The term "Fairness Doctrine" exemplifies what George Orwell called "Newspeak": it uses language to mask the deleterious effects of its purported meaning. The Fairness Doctrine itself was in effect from 1949 until 1987. It required that radio broadcasts devote a reasonable amount of time to the discussion of controversial issues of public importance, and that the broadcaster do that *fairly* by offering reasonable opportunity for opposing viewpoints to be heard. If the Federal Communications Commission found a radio station in repeated violation of this Doctrine, it could take away the station's license—a business form of capital punishment.

One famous victim of the Fairness Doctrine was Radio Station WXUR, controlled by Reverend Carl McIntire—a fiery right-wing fundamentalist preacher—which refused to abide by the Doctrine and lost its license in 1972. The case that upheld this action by the FCC was *Brandywine-Main Line Radio, Inc. v. Federal Communications Commission*. A dissenting judge on the District of Columbia

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Court of Appeals, David Bazelon, sided with the extinguished radio station. The FCC, he said, had deprived the listeners to WXUR of that broadcaster's ideas, "however unpopular and divisive we might judge those ideas to be." Broadcasting its ideas, Mr. Bazelon held, was WXUR's First Amendment right.

Supreme Court Justice William O. Douglas opposed the Fairness Doctrine on the same grounds: "I fail to see," he wrote in 1973 in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, "how constitutionally we can treat TV and radio differently than we treat newspapers." Douglas was right. "The Fairness Doctrine has no place in our First Amendment regime," he continued. "It puts the head of the camel inside the tent and enables administration after administration to toy with TV or radio in order to serve its sordid or its benevolent ends." But in a unanimous 1969 decision in *Red Lion Broadcasting Company v. FCC* (in which Douglas didn't participate, having missed oral arguments), the Supreme Court had already strongly validated the Fairness Doctrine. Broadcasters are licensed by the government, the Court argued. The spectrum of public frequencies is a public resource, and since there is a scarcity of available channels—unlike newspapers and print publications, where there is no limit to the number that can be produced—the Fairness Doctrine, the Court held, was legitimate. This came to be called the "scarcity doctrine."

I was in radio under the reign of the Fairness Doctrine, at WMEX in Boston in the 1940s and early 50s. We did not have any of the present-day contentious talk radio shows, but we covered politics and politicians. I was often the announcer for the mellifluous appearance of the legendary James Michael Curley (played by Spencer Tracy in *The Last Hurrah*). And we did offer political opinions on the air. I, for example, did so on my jazz and folk music programs.

Suddenly, Fairness Doctrine letters started coming from the FCC and our station's front office panicked. Lawyers had to be summoned; tapes of the accused broadcasters had to be examined with extreme care; voluminous responses had to be prepared and sent. After a few of these FCC letters, our boss announced that there would be no more controversy of any sort on WMEX. We had been muzzled.

This happened at other radio stations as well. And as evidence mounted that the Fairness Doctrine lessened, rather than increased, diversity of views, the Supreme Court in 1984—in a case called *FCC v. League of Women Voters*—concluded that in view of the abounding number of radio and television channels around the country (and, I would add, the growth of one-newspaper towns and cities), the scarcity doctrine (thus the Fairness Doctrine) didn't hold up. In 1987, the FCC followed the high court and ringingly declared that "the intrusion by government into the content of programming occasioned by the enforcement of the [Fairness Doctrine] unnecessarily restricts the journalistic freedom of broadcasters…[and] actually inhibits the presentation of controversial issues of public importance to the detriment of the public and in degradation of the editorial prerogative of broadcast journalists."

I was by then in radio and television part-time in New York, and I thought at last that this free-speech battle was over. But in that same year, 1987, a bill to *revive* the Fairness Doctrine passed the House by a 3 to 1 margin and the Senate by nearly 2 to 1. President Reagan, to my great appreciation—though I was not an admirer of his then (I have changed to a considerable extent)—vetoed the bill. Mr. Reagan, a former broadcaster (*Death Valley Days*), called it "antagonistic to the freedom of expression guaranteed by the First Amendment."

But a stake was not driven into the censorious heart of the Fairness Doctrine. There is today a rising campaign—mostly from the left—to bring it back.

The Current Debate

On May 9, 2005, in the magazine *In These Times*, University of Michigan communications professor Susan Douglas made the case for reviving the Fairness Doctrine—and listen carefully to her language: "Ongoing media consolidation, and the censorship and pro-right blather that go with it, are sustained by the silencing of oppositional voices Americans are no longer required to hear." But who should do the requiring? According to Professor Douglas, the government should, of course. Another question is: Which voices are being silenced, and by whom? The professor neglected to say. Not hers, obviously.

Last year, a book widely praised in certain circles, *Off Center: The Republican Revolution and the Erosion of American Democracy*—at least the title tells you where the authors, Jacob Hacker and Paul Pierson, are coming from—argued:

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Hillsdale Happenings

FALL 2005



Construction was completed on two new classroom buildings, Kendall Hall (left) and Lane Hall (right). They will open to students and faculty for the spring 2006 semester. Kresge Plaza, featuring the College's 1895 Civil War Soldier's Monument, runs between the two buildings.



Senior Cory Coe drives to the basket in a season opening exhibition game against the University of Cincinnati. Both the men's and women's basketball teams are off to excellent starts.



Best-selling author Dinesh D'Souza speaks at the gala celebration marking the 15th anniversary of Hillsdale Academy, the College's K-12 model school.



The Hillsdale College Tower Players staged a performance of William Shakespeare's The Tempest *in Markel Auditorium at the Sage Center for the Arts.*



William and Berniece Grewcock with President Larry P. Arnn during Homecoming weekend, following groundbreaking ceremonies for the new Grewcock Student Union

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> It is precisely the proliferation of new media that has fostered a strongly right-wing journalistic presence in talk radio and on cable.... The Federal Communications Commission. . .surely can justify restoring the simple requirement that news include a fair representation of views on controversial subjects and in important electoral races.

There are still some libertarians on the American left who believe that the First Amendment means what it says, but these others who are calling for this revival of government involvement in broadcast content—and this could well extend to the Internet, as it does today in China—take sides against Oliver Wendell Holmes, who wrote in 1929 in *United States v. Schwimmer*: "...if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."

Those rallying for the return of the Fairness Doctrine believe that politically incorrect speech must be "balanced" by law—which is to say, by government. Thereby they fondly envision the curbing of the speech of Rush Limbaugh, Sean Hannity, Ann Coulter, Matt Drudge, Laura Ingraham, Bill O'Reilly and others who they say are "eroding" American democracy. And arguing this, it is as if they think that the speech of the authors of *Off Center*—or of Al Franken, Michael Moore, Cindy Sheehan, political scientists Barbra Streisand and Whoopi Goldberg, and the bankrollers of MoveOn.Org—are not heard enough today!

Obligingly, a Congressman has come forth with a bill to bring back the Fairness Doctrine in order to protect, he says, "diversity of views." He is Maurice Hinchey of New York, and his bill is called the Media Ownership Reform Act of 2005. In addition to "preventing excessive concentration of ownership of the nation's media outlets," it includes the restoration of "fairness in broadcasting. . .to foster and promote localism, diversity, and competition in the media." His press secretary tells me that the penalties this time could be as before: broadcasters losing their licenses.

What could be wrong with such noble motives as "fairness" and "diversity of views?" But I see, as William O. Douglas did, that the camel is hungrily and happily back inside the tent of free speech.

Look Out for Big Brother

A brief digression: Several years ago, I was the first writer for the *Village Voice* to be invited to speak at the annual convention of the American Conservative Union. Its president, David Keene, asked me to come for a debate on the Patriot Act. My teammate in that debate was conservative libertarian Bob Barr. Then about a year ago, a friend told me to look at the Right Wing Watch on the Web site of People for the American Way. This is a list of people of suspicion—people to be watched carefully as accomplices in the "erosion of American democracy" (as the authors of *Off Center* would have it). I was on this list because, the Web site said, I had been present at a conference of the American Conservative Union. Years earlier, People for the American Way had given me a Lifetime Achievement Award—an act I suspect it regrets because of my fierce disagreements with it over its leading role in making a war zone of the process of confirming judges in the U.S. Senate—whereas now I was a right-winger and had to be watched.

So I called Ralph Neas, head of People for the American Way, and suggested that there was a touch of McCarthyism in listing names like that based solely on whom a person associates with. After all, the First Amendment guarantees freedom of association. Mr. Neas said he'd remove my name—but I won't be surprised if it's back there soon, if only because I am here at Hillsdale! This story is a reminder that it is not only the FBI who is interested in those with whom you associate.

But let us return to Congressman Hinchey, the bandleader for the revival of the Fairness Doctrine. I don't see any sign that his free speech rights in our democracy are being eroded. Indeed, Michael Barone's and Richard Cohen's invaluable *Almanac of American Politics* notes that in February of last year, Hinchey "advanced the theory, for which he admitted he had no evidence, that White House strategist Karl Rove had created the forged documents on which Dan Rather based his September 2004 broadcast on George W. Bush's National Guard service."

I hope the Congressman is reassured that his freedom of speech, however malignly imaginative, remains uneroded. I doubt if Karl Rove has the time to file a defamation suit—although if he did, I sure would like to be present at the free

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exchange of testimony during the depositions under oath.

As for the Fairness Doctrine, I'll begin my conclusion with the aforementioned dissent by Judge Bazelon in the case upholding it in 1972:

> In subjecting WXUR. . .to the supreme penalty, the [FCC]. . .has also dealt a death blow to the licensee's freedom of speech and press. Furthermore, it has denied the listening public access to the expression of many controversial views. Yet the Commission would have us approve this action—in the name of the Fairness Doctrine!

In preparing this talk, I asked Congressman Hinchey's press secretary for an interview with this paladin of fairness in broadcasting. I was told each time that it would not be possible—maybe because my nationally syndicated column appears in the *Washington Times*. That's his right. The government cannot compel anyone to respond to a reporter. But I regret being deprived of the Congressman's reaction to a statement about our constitutional democracy written by Justice William O. Douglas in *Terminiello v. City of Chicago*, which I had intended, as a public service, to present to him:

> . . .a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger . . . . That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship . . . .

Before the Fairness Doctrine was ended, at least for the time being, in 1987—Congressman Hinchey could yet prevail in reviving it if the Democrats retake Congress—Richard Salant, head of CBS News while the Doctrine was flourishing, said to me:

> Suppose the English government had told Tom Paine that he could go ahead and publish all he liked—but only if at the back of his pamphlets he also printed the Royal Governor's views. That command, far from an implementation of free speech, would have been just the opposite. It's a restriction of speech if, in order to be allowed to express your own views, [the government demands] you also have to present those of someone arguing on the other side.

James Madison did not have bifurcation of free speech in mind when he submitted his draft of the First Amendment.

Thank you for inviting me to Hillsdale, which has more courses on the Constitution than any other college. And keep your eye on People for the American Way's Right Wing Watch. You may find yourself there one day.



Objectivity in Journalism

David Brooks
Journalist

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DAVID BROOKS is a columnist for the *New York Times* and a regular analyst on *NewsHour with Jim Lehrer*. Prior to joining the *Times*, he was a senior editor at the *Weekly Standard* and op-ed editor at the *Wall Street Journal*. He is the author of two books, *BoBos in Paradise: The New Upper Class and How They Got There* and *On Paradise Drive: How We Live Now (and Always Have) in the Future Tense*.

The following is an excerpt from a speech delivered at Hillsdale College on November 16, 2005.

The real core of journalism is objectivity—seeing the truth whole and being fair about it. Thus the answer to liberal bias is not conservative bias. It is objectivity.

There is some dispute about whether objectivity can really exist. How do we know the truth? Well, I'm not a relativist on the subject. I think there is truth out there and that objectivity is like virtue; it's the thing you always fall short of, but the thing you always strive toward. And by the way, I think that opinion journalists have to be objective just as much as straight reporters. Opinion journalists, too, have to be able to see reality wholly and truly. As George Orwell said, they have to face unpleasant facts just as much as anybody else.

What are the stages of getting to objectivity? The first stage is what somebody called negative capacity—the ability to suspend judgment while you're looking at the facts. Sometimes when we look at a set of facts, we like to choose the facts that make us feel good because it confirms our worldview. But if you're going to be objective—and this is for journalists or anybody else—surely the first stage is the ability to look at *all* the facts, whether they make you feel good or not.

The second stage is modesty. And here I think one of the great models of journalism is someone we just saw at a Senate confirmation hearing—Chief Justice John Roberts. He was asked by the Senators to *emote*. Senator Dianne Feinstein, for instance, asked him how he would react as a father to a certain case. It was as if she and other Senators wanted him to weep on camera. They wanted him to do the sentimental thing, in order to make them feel that he was one of them. But he absolutely refused, because his ethos as a lawyer and as a judge is not about self-exposure. It's about self-control. It's about playing a role in society—a socially useful role. Roberts kept explaining that judges wear black robes because it's not about them; it's not about narcissism. It's about doing a job for society. Judges have to suppress some of themselves in order to read the law fairly and not prejudge cases.

The same thing has to happen for journalists. We live in an age of self-exposure. But journalists have to suppress their egos so that they can see the whole truth, whether they like it or not.

The third stage of objectivity is the ability to process data—to take all the facts that you've accumulated and honestly process them into a pattern. This is a mysterious activity called judgment. How do you take all the facts that are in front of you and fit them into one pattern? If you pick up a cup of coffee, one part of your brain senses how heavy it is. Another part of your brain senses how hot it is. Another part of your brain senses the shape of the cup. Another part of your brain knows that you're shaking, which creates ripples across the surface of the coffee. All these parts are disconnected and we have no idea how the human brain processes that information. But some people are really good at connecting the dots and seeing the patterns and other people are not. And surely that's the third stage of objectivity—the ability to take all the data, not just the data you like, and form it into a generalizable whole.

The fourth stage of objectivity is the ability to betray friends. In Washington, there's loyalty to the truth and loyalty to your team. And in government, loyalty to your team is sometimes more important than loyalty to the truth. If you're a U.S. Senator, you can't tell the truth all the time. If you work for an administration, you can't tell the truth all the time, because government is a

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team sport. The only way you can get something done is collectively—as a group. It takes a majority to pass a piece of legislation. It takes an administration working together to promulgate a policy. And that's fine. Politicians betray the truth all the time in favor of loyalty to a higher good for them. But for journalists and for most citizens, loyalty to the truth should supplant loyalty to the team. And frankly, that no longer happens enough. For example, when I came to the *New York Times*, there was a guy at the *Times* named Paul Krugman writing against President Bush twice a week. I had to decide whether I wanted to be the anti-Krugman and write pro-Bush columns every week. It would have been good for the team. But I decided it wouldn't be good for the truth. So I decided not to do that.

The fifth stage of objectivity is the ability to ignore stereotypes. This is the oldest rule of journalism. Walter Lipmann once noted that most journalism is about the confirmation of stereotypes—preexisting generalizations we all have in our heads. The ability to ignore these stereotypes is crucial to objectivity.

And the last bit, the sixth stage, is a willingness to be a little dull. It's easy to write a lambasting, vitriolic attack on someone. But usually—unless that person is Adolf Hitler—that's not fair.

I'm someone who fails every day at being objective. But I still think that's the old-fashioned virtue that has to be respected above the good of partisan opinion—the reason being, again, that there is something that exists out there called truth.

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